

Letter of Findings: 06-0061
Individual Adjusted Gross Income Tax
For the Years 2000, 2001, 2002, 2003, and 2004

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ISSUE

I. Fifth Amendment – Individual Income Tax Returns.

Authority: U.S. Const. amend. V; United States v. Sullivan, 274 U.S. 259 (1927); Sochia v. Commissioner, 23 F.3d 941 (5th Cir. 1994); United States v. Neff, 615 F.2d 1235 (9th Cir. 1980); United States v. Brown, 600 F.2d 248 (10th Cir. 1979); United States v. Daly, 481 F.2d 28 (8th Cir. 1973); United States v. MacLeod, 436 F.2d 947 (8th Cir. 1971).

Taxpayer argues that the Fifth Amendment precludes him giving information relevant to taxpayer's Indiana income tax protest.

STATEMENT OF FACTS

In April 2005, the Indiana Department of Revenue (Department) instituted a review of taxpayer's individual state income tax liability. To that end, taxpayer was asked to provide "tax return information" and information related to a "Family Trust." There is nothing available which indicates taxpayer responded. Thereafter, taxpayer's representative contacted the Department concerning information provided taxpayer concerning the Department's Amnesty Program. Taxpayer's representative indicated that the taxpayer purportedly owed individual state income tax for 2000, 2001, 2002, 2003, and 2004. Taxpayer's representative stated that taxpayer was a "criminal defendant in a federal tax case" and objected to filing for or paying Indiana income tax on the ground that either "could be used against [taxpayer] in the federal criminal case." In November 2005, taxpayer's representative sent a letter to the Department indicating that the taxpayer wished to "avail himself of the Indiana Amnesty Program" by making a payment before the Amnesty deadline of November 15, 2005. Taxpayer forwarded a payment which was received and credited to taxpayer's purported outstanding income tax liabilities.

On November 15, 2005, the Department issued an Investigation Summary stating that the taxpayer had "failed to report and pay Federal, State and/or County income taxes for calendar year(s) beginning January 1, 2000 and ending December 31, 2004." The Summary further stated that taxpayer had failed to "make available pertinent information to determine his total gross income for calendar years 2000 through 2004." As a result, the Department issued proposed notices of assessment based upon the "best information available."

On January 25, 2006, taxpayer submitted a "formal protest" of the proposed assessments arguing that the assessments were "arbitrary and capricious." Taxpayer claimed that the assessments were made in contravention of the "amnesty agreement" and that taxpayer reiterated his "formal claim of Fifth Amendment protection" based on the argument that taxpayer was under a "pending federal criminal indictment for the same years." However, taxpayer's representative assured the Department that the federal action was "set to commence the beginning of September, 2006" and that federal action would take "four to six weeks... to conclude." Taxpayer further assured the Department that he would file tax returns prior to commencement of the federal action.

The Department responded by staying further efforts to collect on the unpaid portion of the proposed assessments and staying administrative action on the January 2006 protest.

Taxpayer's hearing was set for March 3, 2006. Taxpayer responded arguing that taxpayer had "filed an amnesty agreement" and reiterated once again the taxpayer's "absolute right" to remain silent regarding any financial issues. The Department responded by postponing the scheduled March 3 hearing pointing out that there was no evidence of an "amnesty agreement" but that the taxpayer "simply made a payment during the amnesty period taking advantage of the benefits attendant to Indiana's amnesty program."

On October 15, 2007, the Department rescheduled the March 3 hearing until November 4, 2007. Taxpayer again objected "[i]n light of the ongoing criminal matter asking a postponement until July 7, 2008," but assuring the Department that the "July 2008 hearing date would not be adjourned again."

The department on March 7, 2008, agreed and scheduled the administrative hearing for July 7, 2008, some two and one-half years after taxpayer first protested the assessment.

However, as time approached for the July hearing, the taxpayer again objected, seeking another postponement on the ground that the federal action would commence sometime during the fall of 2008. The Department declined the opportunity and the hearing was held on July 9, 2008. This Letter of Findings results.

I. Fifth Amendment – Individual Income Tax Returns.

DISCUSSION

Taxpayer maintains that he is entitled to claim a Fifth Amendment protection thereby precluding him from filing Indiana income tax returns or actively participating in the state administrative procedure challenging the

proposed assessments. The privilege against self-incrimination contained in the Fifth Amendment appears straightforward. The words merely provide that "[no] person... shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. Taxpayer asserts that because he is the defendant in a federal criminal proceeding, he may refuse to file state income tax returns or give evidence as to his Indiana income tax liability because that information could conceivably be used against him in the ongoing federal criminal case.

The United States Supreme Court first addressed the role the Fifth Amendment plays in statutory reporting requirements in *United States v. Sullivan*, 274 U.S. 259 (1927). In *Sullivan*, the defendant had been convicted for failing to file an income tax return. *Id.* at 260. He challenged his conviction on the basis that submission of the return would have been self-incriminating and therefore he was protected from compelled disclosure under the privilege against self-incrimination. *Id.* The defendant's argument proved unsuccessful. *Id.* at 260.

It would be an extreme if not an extravagant application of the Fifth Amendment to say that it authorized a man to refuse to state the amount of his income because it had been made in crime. But if the defendant desired to test that or any other point he should have tested it in the return so that it could be passed upon. He could not draw a conjurer's circle around the whole matter by his own declaration that to write any word upon the government blank would bring him into danger of the law. *Id.* at 263-64.

Federal courts have since followed the *Sullivan* decision in hold that the Fifth Amendment does not allow a taxpayer to refuse to file a return. "The statutory requirement to file an income tax return does not violate a taxpayer's right against self-incrimination." *United States v. MacLeod*, 436 F.2d 947, 951 (8th Cir. 1971). In *United States v. Brown*, 600 F.2d 248, 252 (10th Cir. 1979), the court found that the Supreme Court had established "that the self-incrimination privilege can be employed to protect the taxpayer from revealing the information as to an illegal source of income, but does not protect him from disclosing the source of income." The court held that the defendant/appellee had made "an illegal effort to stretch the Fifth Amendment to include a taxpayer who wishes to avoid filing a return." *Id.* at 252.

The Department concludes that the weight of judicial opinion weighs heavily against taxpayer's assertion that the Fifth Amendment precludes him from filing state income tax returns. See also *United States v. Neff*, 615 F.2d 1235, 1239 (9th Cir. 1980); *United States v. Daly*, 481 F.2d 28, 30 (8th Cir. 1973); *Sochia v. Commissioner*, 23 F.3d 941 (5th Cir. 1994) (affirming tax assessments and penalties for failure to file returns, failure to pay taxes, and imposing sanctions for pursuing a frivolous case including petitioners' argument that a "'Fifth Amendment Return' is a valid, legal, legitimate, proper, and correct tax return....").

The Department concludes that taxpayer may not draw a Fifth Amendment "conjurer's circle" around the issue of whether he is required to file Indiana income tax returns and properly report Indiana source income.

FINDING

Taxpayer's protest is denied.

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